2
PAGE
MAR 3

No. 88-1168

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD C. SWAIN and
EDWARD H. HAMMOND **PETITIONERS**

v.

KENNETH A. LINDSEY **RESPONDENT**

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

PETITIONERS' BRIEF IN REPLY

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February 20, 1989

6p

TABLE OF CASES AND AUTHORITIES

Cases:	Page
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).....	2
Sosna v. Iowa, 419 U.S. 393 (1975).....	2

No. 88-168

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD C. SWAIN and
EDWARD H. HAMMOND — PETITIONERS

v.

KENNETH A. LINDSEY — RESPONDENT

PETITIONERS' BRIEF IN REPLY

Respondent has argued in his Brief in Opposition to the Petition of Donald C. Swain and Edward H. Hammond for a writ of certiorari to the Court of Appeals of Kentucky ("Court of Appeals") that the "matter for which review is sought is moot." (Respondent's Brief at 4). The question presented is not moot because the decision of the Court of Appeals that no question of sovereign or qualified

immunity shall be decided until after trial on the merits will recur each time a 42 U.S.C. § 1983 action is brought in a Kentucky court. The question is not only capable of repetition, but must be repeated because the decision below, for which certiorari is sought, has closed the door to early appeal in all § 1983 cases involving these or other officials of the Commonwealth of Kentucky. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Sosna v. Iowa, 419 U.S. 393 (1975).

More importantly, in view of the fact that no Kentucky court would stay the trial below pending this Court's review of Petitioners' writ, a significant number of federal claims of immunity will be forced to trial with no individual defendant capable of retaining a personal adversary position prior to a review by this Court.

Petitioners timely raised the defense of immunity by answer, by motion for summary judgment and by appeal. Petitioners timely requested each court in the Kentucky judicial system stay the trial of this action; the final request was filed with the Kentucky Supreme Court in December 1988, but that Court did not reject Petitioners' request until February 2, 1989, six days before trial. Petitioners' efforts to vindicate their federal right of immediate appeal simply could not be fully litigated prior to the trial of the underlying action.

In conclusion, the necessity of a determination of an issue of immunity prior to trial has been recognized by this Court. The collateral yet final nature of this issue of law requires it to be decided prior to a trial on the merits. The sole issue for which Petitioners seek a writ of certiorari is whether federal law entitles Defendants to a final

decision, through appeal, on issues of immunity, before trial, when § 1983 actions are brought in state, not federal, court. This issue remains viable and has not been mooted by the trial of the case below. Petitioners again respectfully request this Court grant their petition for writ of certiorari.

Respectfully submitted,

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